Nos. 84-1700 and 84-1704

In the Supreme Court of the United States

OCTOBER TERM, 1984

JEROME OTTO LILL, PETITIONER

v.

UNITED STATES OF AMERICA

MARSHALL MECHANIK, AKA MICHAEL PATRICK FLANAGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether convictions on the substantive counts of a superseding indictment, which were identical to counts in a valid prior indictment, should be reversed because two government agents appeared at the same time as witnesses before the grand jury that issued the superseding indictment (both petitioners).

2. Whether police officers had probable cause to stop a truck and arrest its driver or had reasonable suspicion to believe that a box in the truck could be dangerous (petitioner Mechanik only).

3. Whether petitioner Mechanik was denied the effective assistance of counsel on direct appeal by the court of appeals' Local Rule 19 (now 4th Cir. R. 28), which limits each side in a consolidated case to a single brief in the absence of good cause for separate briefs.

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OPINION BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. A1-A14[1]) is reported at 756 F.2d 994. The panel opinion (Pet. App. B1-B12) is reported at 735 F.2d 136. The opinion of the district court denying the motion to dismiss (Pet. App. D1-D27) is reported at 511 F. Supp. 50. The

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[1]"Pet. App." references are to the petition in No. 84-1704.

opinion of the district court ruling on the motion to suppress (Pet. App. E1-E10) is not reported.

JURISDICTION

The judgment of the en banc court was entered on March 1, 1985. The petitions for a writ of certiorari were filed on April 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

STATEMENT

Following a three month jury trial in the United States District Court for the Southern District of West Virginia, petitioners were convicted of conspiracy, in violation of 18 U.S.C. 371 (Count 1). In addition, petitioner Mechanik was convicted of traveling in interstate commerce to carry on an illegal business enterprise, in violation of 18 U.S.C. 1952 (Count 10), and petitioner Lill was convicted of importing marijuana and possession with intent to distribute marijuana, in violation of 21 U.S.C. 952 and 841 and 18 U.S.C. 2 (Counts 2 and 4). Petitioners were each sentenced to five years' imprisonment and fined $10,000. The court of appeals affirmed petitioners' convictions on the substantive counts and reversed their convictions on the conspiracy count (Pet. App. A5).

1. a. On June 6, 1979, shortly before 1:00 a.m., a plane loaded with marijuana crash landed at the Kanawha County Airport near Charleston, West Virginia.[3] Shortly thereafter, two large Ryder rental trucks were seen leaving the airport. Around 1:30 a.m., a citizen alerted two police

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[2]The United States has also filed a petition for a writ of certiorari in this case, presenting questions related to the first question presented herein. See *United States* v. *Mechanik*, petition for cert. pending, No. 84-1640 (filed Apr. 17, 1985).

[3]This description of evidence relating to the arrest of petitioner Mechanik is taken from the brief for the United States in the court of appeals (Appellee's Br. 11-15, 30-40).

officers that something had been thrown or had dropped off a Ryder truck traveling east on Route 61 in West Virginia. The police then observed the truck speeding away from an intersection, gave chase, and called for backup assistance. The Ryder truck was speeding, failed to yield to the siren or blue light, and traveled left of center when the police cruiser attempted to pull alongside the truck. When the Ryder truck finally came to a stop, the police officers approached it with weapons in hand.

When the officers reached the truck, they found three men seated in the cab, and a fourth man in the back of the truck. The driver, later identified as petitioner Mechanik, produced identification bearing the name of Michael Patrick Flanagan. He told the officers that they were on the way to South Carolina. Given the road on which he was traveling, the officers had difficulty believing petitioner's story.

After the passengers were out of the truck, the officers noticed a blue box on the floor of the cab, leaning against the front seat. Before allowing any of the passengers to return to the cab, the officiers removed the box to determine whether it contained anything that could be harmful to them; the box contained a ground-to-air aviation radio unit. Soon thereafter, the officers were advised over the police radio that the State Police wanted to question the subjects in the Ryder rental truck in connection with a plane crash in Charleston. The four occupants of the truck, including petitioner Mechanik, were taken to the county jail in Charleston.

b. Following extensive pre-trial hearings and evidence, the district court found that "both reasonable cause and probable cause existed to detain, arrest and later charge" petitioner Mechanik and three co-defendants with the "offenses for which they were subsequently indicted" (Pet.

App. E1). The court determined that the Ryder truck driven by petitioner Mechanik "was violating the law by speeding, by failing to yield to the signal of an officer and by efforts to run the officers off the road or prevent the officers from stopping the truck" (*id.* at E2). In supplemental findings, the district court ruled on the propriety of the search and seizure of the ground-to-air radio (*id.* at E3). Stating that "[n]othing adduced at trial warrants reconsideration and revision of * * * [the prior] findings and ruling" (*id.* at E2), the district court affirmed that the police officers "had probable cause and the statutory authority to arrest the driver of the truck, Mechanik, for the multiple moving traffic offenses which took place in the presence of the officers" (*id.* at E8-E9). The court thus concluded that the officers "were entitled to search Mechanik and any object within his immediate access or within the cab to which either Mechanik or the other defendants would be returned if released, in order to discover any weapons or destructible evidence" (*id.* at E9).[4] Further, the fact that the officers had not placed Mechanik under formal arrest "did not obviate their authority to search inasmuch as probable cause to arrest existed at the time of the search" (*ibid.*).

2. As described in the government's petition for certiorari in No. 84-1640 (at 3-5), a grand jury returned an indictment on June 14, 1980, against petitioners and seven co-defendants. Subsequently, the same grand jury heard additional evidence and returned a superseding indictment in many respects similar to the first. The substantive counts of the indictment against petitioners Lill and Mechanik, which are the subject of this petition, were identical in the two indictments.

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[4]Given the size, appearance and extraordinary weight (22 pounds) of the blue container, the district court concluded that the item could not have been personal luggage or an item in which a reasonable expectation of privacy existed (Pet. App. E7).

The transcripts reveal that during the presentation of evidence that led to the superseding indictment, two federal Drug Enforcement Agents (DEA) agents appeared together and testified jointly. Upon learning of the joint testimony during the second week of trial, petitioners and their co-defendants moved to dismiss the indictment for violation of Fed. R. Crim. P. 6(d). Despite concluding that the joint appearance of the agents was in violation of the Rule, the district court denied the motion to dismiss on the ground that there was no prejudice to the defendants from the violation.

3. a. The court of appeals panel affirmed the district court's findings and conclusions relating to the search and seizure of the ground-to-air radio (Pet. App. B9). Because the "police had probable cause to stop the truck and arrest its driver for several violations of traffic laws," the panel held that the search of the passenger compartment was authorized. The panel also held, in the alternative, that the search "was permissible because the police had a reasonable belief based on specific facts that the occupants were dangerous" (*ibid.*).

b. The panel divided in reversing petitioners' conspiracy convictions on the basis of the Rule 6(d) violation, the majority stating that "[w]e reject the argument that defendants must show that a rule 6(d) violation prejudiced them before an indictment may be dismissed" (Pet. App. B6). The panel affirmed the convictions of petitioners on the substantive counts of the indictment, however, because the three substantive counts in the superseding indictment were identical to counts returned in the original indictment by the same grand jury.

On rehearing en banc, by a 7-5 vote, the full court again reversed the conspiracy convictions for the reasons stated by the panel majority. The convictions of petitioners on the substantive counts were affirmed, two judges dissenting. In

the dissenters' view, the indictment on these counts should have been dismissed "for the same reasons" that the conspiracy count was dismissed (Pet. App. A4). The opinions of the court of appeals are discussed in our petition in No. 84-1640 (at 7-9).

ARGUMENT

1. We agree that this Court should review petitioners' claim that their convictions on the substantive counts of the indictment should be reversed. In our petition we have contended: (1) that a facially valid indictment returned by a legally constituted and unbiased grand jury may not be dismissed on the basis of a procedural irregularity in the grand jury proceeding; (2) that after an otherwise valid conviction has been entered by a petit jury such irregularity does not provide a basis for reversal of the conviction; and (3) that reversal of a conviction and dismissal of an indictment is an inappropriate remedy for a procedural irregularity in a grand jury proceeding absent demonstrable prejudice to the defendant. Petitioners take the opposite view, contending that a Rule 6(d) violation constitutes a per se basis for dismissing an indictment and reversing any conviction thereon, whether or not any prejudice can be shown.

The court of appeals' reversal of petitioners' conspiracy convictions is consistent with petitioners' view—*i.e.*, that no showing of prejudice is required. As we observed in our petition in No. 84-1640 (at 21 n.15), however, the court's affirmance of petitioners' convictions on the substantive counts is in tension with the rationale for its reversal on the conspiracy counts. With respect to both the conspiracy and the substantive counts, the district court found that defendants were not prejudiced by the Rule 6(d) violation, and the court of appeals did not overturn that conclusion. To be sure, it is more patently obvious that the joint testimony before the grand jury did not influence the substantive counts, since they were *identical* to counts in the prior, valid

indictment; but the district court's meticulous analysis demonstrated that the conspiracy count could not have been influenced either. While the difference in the circumstances relating to the conspiracy and substantive counts makes reversal of the latter even more extravagant and unjustified than reversal of the former, there is a cogent basis for arguing that both should be treated the same.

Accordingly, although we believe that petitioners' convictions should be affirmed on both the conspiracy and the substantive counts, the issue petitioners present is sufficiently closely related to the one we have presented that we believe it makes sense for the Court to consider both.[5]

2. Petitioner Mechanik's argument (84-1704 Pet. 16) that the district court erred in admitting into evidence the ground-to-air radio seized from the truck is without merit and does not warrant review by this Court. The court of appeals correctly cited two independent bases that justified the seizure of the radio. The court held that the police had

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[5]Petitioners contend that there is a conflict in the circuits on the controlling issue in this case (84-1704 Pet. 12; 84-1700 Pet. 11). We agree, at least with respect to the aspect of the issue presented in our petition. No court of appeals, however, has gone so far as to reverse a conviction under the circumstances surrounding the substantive counts on which petitioners were convicted. Petitioners err in contending that the decision of the court of appeals conflicts with *United States* v. *Fulmer*, 722 F.2d 1192 (5th Cir. 1983). In *Fulmer*, the district court dismissed a second superseding indictment with prejudice upon finding that the cumulative effect of the government's " 'blunders and errors in prosecution,' " including the appearance of an unsworn FBI agent who read prior grand jury testimony to the grand jury, "finally reached a level where Mr. Fulmer's rights * * * to a fair trial would be violated by further prosecution" (722 F.2d at 1195 (citation omitted))). At the time of the dismissal, there had been no trial of the merits. Moreover, the government did not challenge the dismissal of the indictment; rather, the government contended only that the dismissal should have been without prejudice. Granting the government the entire relief requested in its appeal, the court affirmed the dismissal but modified the judgment so that the dismissal was without prejudice.

probable cause to stop and arrest petitioner for violations of traffic laws (Pet. App. B9). Relying on *New York* v. *Belton*, 453 U.S. 454, 460 (1981), the court of appeals accurately observed that "[p]robable cause to arrest authorized the police to search the passenger compartment" (Pet. App. B9).

Alternatively, the court below properly viewed the search of the truck as justified "because the police had a reasonable belief based on specific facts that the occupants were dangerous" (Pet. App. B9). In *Michigan* v. *Long*, No. 82-256 (July 6, 1983), this Court established the right of police officers to search the passenger compartment of an automobile for hidden weapons "if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons" (slip op. 16, quoting *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968)).

The decision below is firmly supported by the district court's factual findings. The district court found that the "peculiar actions of the driver in thwarting the efforts of the officers to bring the speeding truck to a stop," together with "knowledge of the officers that something had been thrown or dropped from the truck * * * were sufficient to justify the concern on their part that their safety would be in danger once they permitted the four defendants * * * to return to the truck" (Pet. App. E7). Accordingly, under *Michigan* v. *Long*, *supra*, the search was permissible on these facts.

Petitioner Mechanik contends, however, that since the officer did not actually believe that he had the statutory authority to arrest the defendants, the search and seizure was invalid (84-1407 Pet. 16-17). This argument is wholly

unresponsive to the premise of *Michigan* v. *Long, supra,* which applies in the absence of probable cause to arrest. Accordingly, there is no occasion to consider what effect, if any, the officer's beliefs about his power to make a custodial arrest would have on his right to conduct a search incident to arrest.

Petitioner does not contend that the decision below conflicts with decisions by any other court. Further review of this decision, which fully comports with this Court's precedents, is not warranted.

3. Finally, petitioner Mechanik contends (84-1704 Pet. 19) that under court of appeals Local Rule 19 (now 4th Cir. R. 28), which limits each side in a consolidated case to one brief in the absence of good cause, he was denied effective assistance of counsel.[6] This contention is without merit, and petitioner's objection to the procedure was not in any event adequately preserved.

The courts of appeals are authorized to regulate their practice "in any manner not inconsistent with [the Federal Rules of Appellate Procedure]" (Fed. R. App. P. 47), and

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[6]Former Rule 19 (now Rule 28) of the United States Court of Appeals for the Fourth Circuit provides:

> Related appeals of petitions for review will be consolidated in the Office of the Clerk, with notice to all parties, at the time a briefing schedule is established. One brief shall be permitted per side, including parties permitted to intervene, in all cases consolidated by court order, unless leave to the contrary is granted upon good cause shown. In consolidated cases lead counsel shall be selected by the attorneys on each side and that person's identity made known in writing to the Clerk within seven (7) days of the date of the order of consolidation. In the absence of an agreement by counsel, the Clerk shall designate lead counsel. The individuals so designated shall be responsible for the coordination, preparation and filing of the brief and appendix.

the court of appeals' rule is not inconsistent with any provision of the rules.[7] Local Rule 19 is not intended to preclude the presentation of issues or arguments, but to encourage individual litigants in a multi-party case to eliminate repetitive arguments and keep their appellate pleadings within manageable limits.

While we believe that the court of appeals should be liberal in granting requests for relief from the rule when good cause is shown to do so, the record in this case demonstrates that the rule did not in fact deny petitioner effective assistance of counsel. Petitioner filed a motion for leave to file his own brief, but that request specifically was contingent on whether the court below granted a motion of his co-defendants to expedite the appeal. Petitioner objected to any expedition, asking the court for leave to file his own brief *if* the motion for expedition were granted. Appellant Mechanik's Opposition To Motion For Expedited Appeal, Or, In The Alternative, Motion For Leave To File A Separate Brief (filed Oct. 13, 1980). The motion for expedition was denied by the court below, as petitioner requested. Although Local Rule 19 provides that the court will grant leave to file a separate brief "upon good cause shown," petitioner did not make any such request.

Apart from his general statement that he was unable to choose the issues to present on appeal (84-1704 Pet. 19), petitioner has not provided any basis to support his claim that Local Rule 19 prejudiced his ability to obtain effective appellate review of his convictions. Although he asserts (84-1704 Pet. 11) that certain arguments he prepared were ommitted from the consolidated brief, petitioner offers no

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[7]Rule 28(i) of the Federal Rules of Appellate Procedure provides that, in cases involving multiple appellants or appellees, "any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs."

explanation why he was not cognizant of the contents of the brief prior to its being filed. Surely if, as petitioner implies, the lead counsel ignored issues urged by petitioner to provide space for arguments relating only to lead counsel's client and surreptitiously filed the brief without petitioner's approval, petitioner would have (and should have) raised the issue with the court below. In fact, four of the six issues in the consolidated brief related specifically to petitioner, the court gave thorough consideration to the Rule 6(d) issue, which was the only one mentioned in his motion for leave to file a separate brief, and petitioner at no stage apprised the court of appeals that he wished to present claims relating to withholding or destruction of evidence, which he now obliquely suggests (84-1704 Pet. 11) might have been included had there been a separate brief or better coordination among appeal counsel. Nor did petitioner bring these matters to the attention of the court of appeals, or seek to raise additional issues, when the case was reheard by the en banc court.[8]

In sum, Local Rule 19 did not prevent petitioner from choosing which issues to appeal; it simply required counsel to work together to present the court with a concise version of those issues and to prevent repetition where possible. Petitioner never availed himself of the safety net in the rule that allows for separate briefs "upon good cause shown." While petitioner is entitled to effective assistance of counsel on direct appeal (*Evitts* v. *Lucey*, No. 83-1378 (Jan. 21, 1985); see also *Jones* v. *Barnes*, 463 U.S. 745 (1983)), his claim here must fail simply because he has not shown that the procedure could have had any effect on the judgment. *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984).

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[8]One of petitioner's co-defendants, Zarintash, requested and was granted leave to file a separate brief at the en banc stage. See Order dated Oct. 17, 1984.

CONCLUSION

The petitions for a writ of certiorari should be granted, limited to the issue of the remedy for the violation of Rule 6(d).

Respectfully submitted.

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